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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	Docket No. EPCRA-09-94-0015
	)	
CATALINA YACHTS, INC.,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

RESPONDENT'S OPENING BRIEF

I. Preliminary Statement

This case is not about the liability of respondent Catalina Yachts, Inc. (Catalina Yachts) for seven violations of EPRCA's reporting requirements concerning acetone and styrene. Liability is admitted. Rather, it is about the *fair* application of the penalty provisions of EPRCA to the undisputed facts. Under the statutory criteria for the assessment of such penalties, no civil penalty is warranted. Moreover, the imposition of a civil penalty would be unjust, and thus undermine the very law EPA Region IX seeks here to enforce and uphold.

II. The Relevant Law

Section 313 of the Emergency Planning and Community Right To Know Act of 1986, (EPCRA), 42 U.S.C. § 11023(a), requires owners and operators of facilities with 10 or more employees who manufacture, process or otherwise use listed toxic chemicals above certain threshold quantities to file a Toxic Chemical Release Inventory Reporting Form ("Form R") annually with EPA and the state where the facility is located. Styrene is a listed EPRCA toxic chemical. Acetone was a listed EPRCA toxic chemical from 1986 until June 16, 1995, when it was delisted. 60 Fed. Reg. 31643.

Under § 325(c) of EPRCA, 42 U.S.C § 11045(c), "[a]ny person ... who violates any requirement of section 11022 and 11023 ... shall be liable to the United

States for a civil penalty in an amount not to exceed $25,000 for each such violation." Although EPRCA itself is silent as to the criteria which should be applied in assessing civil penalties under § 325(c), the criteria set forth in § 325(b) for violations of § 304 "serve as general guidlines for assessing penalties under § 325(c) for violations of § 313." In re Apex Microtechnology, Inc., Doc. No. EPCRA-09-92-00-07 (May 7, 1993), 1993 WL 256426 (E.P.A.) *4.

Under 40 CFR § 22.27(b), the Presiding Officer "shall determine the dollar amount of the recommended civil penalty to be assessed ... in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act." With regard to EPA's "Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right To Know Act" ("ERP"), it is well established that:

> [W]hile penalty policies facilitate the application of statutory penalty criteria, they serve as guidelines only and there is no mandate that they be rigidly followed.

In Re Pacific Refining Co., EPCRA Appeal No. 94-1, Docket No. EPCRA-09-92-0001, 1994 WL 698476 (E.P.A.) * 4.

Thus, the criteria to be considered in determining the amount of the civil penalty under § 325(b)(1)(C) of EPRCA are as follows:

> In determining the amount of any penalty assessed

> pursuant to this subsection, the Administrator shall take into account the *nature, circumstances, extent and gravity of the violation or violations* and, with respect to the violator, *ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.*

The last or "justice" factor ("such other matters as justice may require") in § 325(b)(1)(C) "vests the Agency with broad discretion to reduce the penalty *when the other adjustment factors [under the ERP] prove insufficient or inappropriate to achieve justice.*" In Re Spang & Company, EPCRA Appeal Nos. 94-3 & 94-4, Slip Op. at 27; emphasis original. Under this factor, voluntary projects which benefit the environment undertaken by respondents militate strongly in favor of reducing potential civil penalties:

> As a matter of policy, the Agency obviously looks favorably upon the undertaking of a project which benefits the environment and which goes beyond the requirements of environmental laws. By considering such behavior in a penalty assessment proceeding the Agency can provide an incentive for companies to engage in environmentally beneficial activities.

In Re Spang & Company, at 28. The Appeals Board also has emphasized that with regard to such projects what is "relevant is a respondent's *past* acts and expenditures.... For example, a project commenced before an enforcement action has begun is more likely to show greater commitment to environmental protection

than one commenced after." Id. at 29; emphasis original.

Finally, "it is a maxim of the Agency's corpus juris that 'civil penalties . . . are intended to deter through regulation, not reprimand through punishment. '" In Re Pacific Refining Co., dissenting opinion by Justice McCallum, at *11; citations omitted.

III. Statement of the Case

This proceeding under § 325 of EPCRA was commenced by the filing of a complaint on June 20, 1994, charging Catalina Yachts with failing to file complete and correct Toxic Chemical Release Inventory Reporting Forms ("Form Rs") with the Administrator and the State of California as required by EPCRA Section 313 and 40 CFR Section 372.30. The alleged failures included failing to report acetone for the years 1988 and 1989, and failing to report styrene for the years 1988 through 1992. For these alleged seven violations, EPA Region IX proposed to assess Catalina Yacht the maximum penalty of $175,000 ($25,000 per violation times 7.)

Catalina Yacht answered, admitting that it was the owner or operator of a plant in Woodland Hills, California, and thus of a "facility" as defined by the Act; its facility falls within Standard Industrial Classification, (SIC) Code 3732; and it employs more than ten "full-time employees" as that term was defined in 40 CFR Section 372.3. In short, Catalina Yacht admitted that it was subject to the Act.

Catalina Yacht also admitted that it used acetone as a cleaning agent at its facility during the years 1988 and 1989 and that it processed products containing styrene at its facility during the years 1988 through 1992, inclusive. It asserted, however, that it was unable at the time of its answer to determine whether it processed or otherwise used acetone and styrene in excess of threshold quantities, and therefore denied any obligation to file "Form Rs." Catalina Yacht requested a hearing to contest the alleged violations and the proposed penalty.

Thereafter, EPA Region IX filed a motion for an accelerated decision as to liability. In response, Catalina Yacht acknowledged that it used resins which contained more than 25,000 pounds of styrene in each year from 1988 through 1992 and that it used more than 10,000 pounds of acetone in 1988 and 1989. Catalina Yacht also acknowledged that it failed to file Form Rs for styrene during the period 1988 through 1992 and for acetone for the years 1988 and 1989. EPA Region IX's motion for an accelerated decision was granted based on these admissions by Order dated January 10, 1995. Catalina Yacht also raised circumstances which it contended should be considered in mitigation of the penalty, and thus the Order specified that the amount of the penalty remained at issue and would be decided after a hearing, if necessary.

On January 28, 1997, a hearing on the amount of civil penalty to be imposed

on Catalina Yacht was held. During the hearing EPA Region IX reduced its penalty demand to $162,500 as a result of the delisting of acetone.

IV. The Undisputed Facts

Catalina Yachts manufactures recreational sail boats from eight-foot dinghies for junior sailing programs to 30-foot cruising boats at 21200 Victory Boulevard, Woodland Hills, California, where it has been located since 1975 and employs approximately 230 employees. (Tr. 78: 23-25; 80:1-4; 80:10-11; 81:3-7.) In 1985, Catalina Yachts opened a second plant in Largo, Florida known as the Morgan Division where it employs 130 employees. (Tr. 80:16-23.)

On November 15, 1993, an EPA Region IX inspector named Bill Deviny visited Catalina Yacht's plant in Woodland Hills. (Tr. 90:5.) Mr. Gerald Douglas, Catalina Yachts' chief of engineering and the person responsible for environmental compliance, described what happened:

> Well, Mr. Deviny was a very cordial man. I was paged to our reception area to meet him, and he identified himself as being from EPA. And he asked if he could have a look around, and he showed me his I.D., and I, of course, accommodated him, and we walked through the plant.
>
> And I explained to him the kind of operation we have here and what we are doing. And he asked about the materials we were using. And he asked if we had been reporting any of those to EPA. I explained that we hadn't, we had been reporting them to AQMD [the local Air Quality

> Management District]. And he advised me at that time of the need to file similar information with the EPA and provided me with the form to do that.

(Tr. 90:9-22.) At the hearing, EPA Region IX confirmed that Catalina Yacht cooperated during the investigation. (Tr. 39:11-14.)

Prior to the November 1993 inspection by Mr. Deviny, Catalina Yachts had never been visited by EPA nor had it ever received any correspondence from EPA. (Tr. 81:13-19.) As Mr. Douglas explained, Catalina Yachts historically reported the use of acetone and styrene and their corresponding air emissions annually to the local Air Quality Management District, which visited the Woodland plant almost monthly. (Tr. 81: 20 - 83:14.) Catalina Yachts also reported its use of these two chemicals to the Hazardous Materials Division of the County of Los Angeles Fire Department. (Tr. 82:3-5.) With regard to these agencies or any other agency, Catalina Yachts has never had a reporting violation. (Tr. 83:15-23.)

The reason Catalina Yachts did not filed Form Rs for its Woodland Hills plant with EPA from 1988 to 1992 is simply that Mr. Douglas, the person responsible for environmental reporting obligations, did not know about the requirement and held a good faith belief that all air toxic and material storage and use reporting requirements, with which Catalina Yachts regularly complied, were local. (Tr. 119:25 - 120: 7; 87:3:11.) Specifically, at the time of Mr. Deviny's visit

in November 1993, Mr. Douglas understood that Catalina Yachts' reporting obligations for its Woodland Hills plant were limited to the AQMD and the Los Angeles Fire Department:

> It was my understanding that the EPA writes certain regulations and then charges the state and local agencies with insuring that industries and towns and individuals, I guess, are in compliance with those regulations, and they might write their own regulations to interpret those. And the local agency, in our case AQMD, is responsible for enforcement of those regulations.

(Tr. 86:20 - 87:2.) With regard to its Largo, Florida plant, Mr. Douglas understood that there was an EPA air toxics reporting obligation because he understood that EPA had not delegated that responsibility to the state of Florida. (Tr. 87:12-25.) Catalina Yachts regularly filed Form Rs with EPA for its Largo plant. (Tr. 88:16 - 89:4.)

For the past 11 years, Catalina Yachts has conducted a community outreach program in order to provide local citizens with information concerning the nature of its manufacturing operations and the materials used at its Woodland Hills plant. (Tr. 99 - 104.) Specifically, Catalina Yachts held, and continues to hold, open houses for any one who would like to visit the Woodland Hills plant every Thursday at 4:00 p.m. Plant tours are given at that time and questions are answered concerning the materials and processes used in boat building. (Tr. 99 - 101.) The tours are

advertized with a sign in the front window of the plant, in the local newspaper, and through the distribution of fliers. (Tr. 102;23 - 103:8.) In 1991, approximately 2,000 people attended a weekend open house held at the Woodland Hills plant; they were provided with information concerning the materials used in the construction of sail boats. (Tr. 103:9 - 104:9.)

On the same day Mr. Deviny visited to Catalina Yachts Woodland Hills plant, Mr. Douglas retained an environmental consultant to assist in the preparation of the seven late Form Rs. (Tr. 90:23 - 91:21.) During the course of gathering the necessary information for the Form Rs, the Woodland Hills plant was severely damaged by the January 17, 1994 Northridge Earthquake and subsequent fire which shut the plant down for four months. (Tr. 91:22 - 93:24.) The epicenter of the earthquake was Northridge, California which is seven miles from the Woodland Hills plant. (Tr. 92:2-3.) Shortly after the Woodland Hills plant reopened, Catalina filed all prior Form Rs with EPA and the Sate of California in May 1994. (Tr. 39:19-21.)

For a number of years, Catalina Yachts has voluntarily undertaken significant projects to improve the environment. In addition to the fact that it manufactures sail boats, which are themselves environmentally friendly, Catalina Yachts has voluntarily instituted four specific projects to improve the environment.

First, in 1991, Catalina Yachts, voluntarily initiated a program to find a substitute for acetone which at the time was used extensively to clean tools and boat parts. (Tr. 104:16 - 110:4.) By 1993, Catalina Yachts had converted to DBE for tool and boat part cleaning thereby eliminating two-thirds of its VOC air emissions at the Woodland Hills plant, or 277,000 gallons of acetone. (Tr. 109:3 - 110:10.) The acetone reduction program cost Catalina Yachts $30,000 in capital expenditures, and $47,000 to $54,000 in additional annual operating expenses. (Tr. 110:14- 111:10.) Thus, over the four years since implementation of the program in 1993, Catalina Yachts has voluntraily spent over $218,000 ($30,000 plus 4 times $47,000) to improve the environment. Catalina Yachts did this even though none of its competitors had. (Tr. 111: 11-15.) In part, because of Catalina Yachts' effort, two boat builders and one tub and shower stall manufacturer subsequently eliminated actone and converted to DBE. (Tr. 112:5-8; Exh. R-6.)

Secondly, in 1994 Catalina Yachts voluntarily eliminated all use of toxic anti-fouling bottom paint at its Woodland Hills plant. As a result of that decision, Catalina yachts has annually lost $28,000 to $30,000 in profit from bottom painting. (Tr. 113:12 - 114:14.) Thus, since 1994, Catalina Yachts has foregone at least $87,000 in profits due to undertakings to improve the environment.

Thirdly, in late 1996, Catalina Yachts voluntarily reduced its air emmissions

of styrene by an estimated 15 to 20 percent by using brushable gel coat in the inital phases of construction of boats thereby eliminating a significant amount of spraying of gel coat which requires high use of the solvent styrene. (Tr. 114:15 - 116:25.) This effort will cost Catalina Yachts $16,000 to $22,000 annually. (Tr. 116:14-25.)

Finally, Catalina Yachts also recently eliminated the use of spirt based contact cement used to glue the furniture components of the boats it manufactures. (Tr. 117:1 - 118:6.) The cost of the materials (water based glues) and labor on this project are essentially a wash. (Id.)

V. Argument

A. EPA Region IX has Failed to Carry its Burden of Proving that the Proposed Penalty of $162,500 is Appropriate

Under 40 CFR § 22.24, EPA Region IX has the burden of proving that the proposed civil penalty is appropriate. As noted above, § 325(b)(1)(C) of EPRCA provides important guidelines for determining the amount of the civil penalty under § 325(c) for violations of § 313. At the hearing, EPA Region IX admitted that in setting the penalty in this case agency staff not only ignored these statutory guidelines but also ignored significant portions of the guidelines set forth in the ERP.

At the hearing, EPA Region IX admitted that it set the original penalty at the

maximum of $175,000 based on only three factors: (1) the fact that reporting violations were involved; (2) the volume of chemicals actually used or processed; and (3) the size of the company in terms of employees and gross sales. (Tr. 44:12 - 45:12; Exh. A, Tsai Decl. Exh. 3.) It further admitted that it later reduced the two acetone violations by 25% because acetone was delisted in 1995, thereby reducing the maximum penalty of $175,000 to $162,500.

With regard to the statutory penalty criteria under EPRCA, EPA Region IX simply ignored them in arriving at a proposed penalty. (Tr. 45:13-20.) With regard to the ERP, EPA Region IX admitted that it did not follow that policy in at least two important respects. By unpublished "practice," EPA Region IX did not consider attitude (cooperation and compliance) in determining the penalty in this case, and thus ignored the potential 15% reduction for cooperation and 15% reduction for compliance. (Tr. 37:25 - 38:13; Exh. A, Tsai Decl., para. 9.) EPA Region IX also did not consider "other factors as justice may require" when it determined the penalty here. (Tr. 36:25 - 37:18; Exh. A, Tsai Decl., para. 9.)

EPA Region IX's obvious desire to maximize penalty collections under EPRCA without regard to the statutory and agency created guidelines should not be permitted. If EPA Region IX elects, as it did in this case, not to follow EPA's ERP, then it cannot fairly invoke only those provisions which maximize the potential

penalty. It is bad government not only to ignore selected provisions of the ERP but also to ignore or dismiss the statutory guidelines which include such factors as the "nature, circumstances, extent and gravity of the violations, ... any prior history of such violations, the degree of culpability, economic benefit (if any) resulting from the violation, and such other matters as justice may require." To do so is also fundamentally unjust.

In short, EPA Region IX has failed to carry its burden and prove that the proposed penalty is appropriate. The penalty requested should be denied.

B. Consideration of the Appropriate Factors Compels the Conclusion that Catalina Yachts Should Not Be Subject To Any Civil Penalty

1. Attitude

Under EPA's ERP, the "attitude" (cooperation and compliance) of a respondent is an important factor to be considered in determining the amount of the penalty to be assessed. As the guideline itself states: "Factors such as degree of cooperation and preparedness during inspection, allowing access to records, responsiveness and expeditious provision of supporting documentation requested by EPA during and after the inspection" are important considerations (a downward adjustment of up to 15%) in determining the amount of the penalty. (Exh. R-2, at 18.) The ERP also states that the penalty may be adjusted downward another 15%

"in consideration of the facility's good faith efforts to comply with EPRCA, and the speed and completeness with which it comes into compliance." (Id.)

The undisputed facts fully support a 15% reduction of the penalty of $175,000 for cooperation and a 15% reduction for compliance. Thus, with an adjustment for the attitude factor the maximal penalty proposed by EPA is properly reduced by $52,500 (30% of $175,000).

2. The Nature, Circumstances, Extent and Gravity of the Violation

Catalina Yachts annually provided local regulatory agencies with information concerning the use and release of acetone and styrene at the Woodland Hills plant, albeit not in a Form R. Catalina Yachts also has made extraordinary efforts over the years through its open house program to inform the local community concerning the materials used at its Woodland Hills plant. Catalina Yachts did not attempt to evade or ignore EPRCA's reporting requirements at any time. Rather, it was simply unaware of the requirement and, because it had never heard from EPA before November 1993, it had a good faith belief that its air toxic reporting requirements were fully satified by regional and local written report's.

If the statutory guidelines (the nature, circumstances, extent and gravity of the violation) are to have meaning when applied to such facts, a further significant reduction of the proposed penalty is compelled. Certainly, such considerations are

at least as important as the attitude factor. Thus, the proposed penalty should be reduced by an additional 30% or $ 52,500.

3. Prior History of Violations

Catalina Yachts has not at any other time violated EPRCA, or any other environmental reporting obligation. Again, if this statutory factor is to have meaning, an additional reduction in the penalty is warranted. A 15% or $26,500 reduction would seem appropriate.

4. Degree of Culpability

In many ways, the degree of culpability factor is subsumed in the "nature, circumstances, extent and gravity of the violation" factors. Thus, no additional adjustment is proposed other than noting that given Catalina Yachts' good faith belief that it was complying with all applicable reporting laws its conduct was not blameworthy. Such a conclusion only reinforces the application of a 30% reduction under the "nature and circumstance" factor.

4. Economic Benefit Resulting From the Violation

Catalina Yachts did not derive any economic benefit from its failure to prepare the necessary Form Rs. As Mr. Douglas explained at the hearing, during the time such reports were due, Catalina Yachts had already retained a consultant to assist it in preparing other air toxic and material use reports. It would have cost

Catalina Yachts at most a few hundred dollars more to have that consultant prepare the Form R reports. (Tr. 98:24 - 99:24.) Accordingly, while we do not suggest here an additional downward adjustment, the facts under this factor reinforce the above proposed reductions.

5. Such Other Matters as Justice Requires

As noted above, the voluntary efforts of a respondent to improve the environment as a matter of good corporate citizenship is an important factor to be considered in assessing a civil penalty under EPRCA. Since 1991, Catalina Yachts has incurred $305,000 in costs and lost profits and will continue to incur annually an additional $91,000 to $106,000 as a direct result of its voluntary efforts to improve its operations for the benefit of the environment and those who live and work at or near the Woodland Hills plant. Such voluntary expenditures are to be encouraged and this should eliminate any further balance on the proposed penalty.

VI. Conclusion

Application of the statutory guidelines for EPRCA's reporting violations to the facts of this case compel the conclusion that no penalty should be assessed in this case. The numbers are summarized as follows:

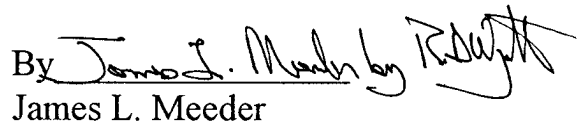
Maximum Penalty	$175,000
Acetone Delisiting (15% of $50,000)	($12,500)

Attitude (30%)	($52,500)
Nature and Circumstances (30%)	($52,500)
Past Violations History (15%)	($26,250)
Past Voluntary Environmental Works	($308,000)
Ongoing Annual Environmental Works	($91,000 to $106,000)

The penalty in this case is not about punishment. Rather, as Justice McCallum has said, it is about assuring that the laws and regulations of the government are followed. Here, to penalize Catalina Yachts would not further compliance with the law. It would be unjust and would only promote the notion that our government is neither caring nor thoughtful.

Dated: April 14, 1997

Beveridge & Diamond

By 
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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 9

In re:	Docket No. EPCRA-09-94-0015
CATALINA YACHTS, INC.,	**POST HEARING BRIEF**
Respondent.	

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND BRIEF

I. INTRODUCTION.

This proceeding concerns a civil administrative enforcement action for penalties brought under the authority of Section 325(c) of Title III of the Superfund Amendments and Reauthorization Act, 42 U.S.C. §§ 11001 et seq. (also known as the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA")) and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22. The action was initiated by the Director, Air and Toxics Division, United States Environmental Protection Agency, Region 9 ("EPA"), through a

Complaint and Notice of Opportunity for Hearing ("Complaint") filed with the Regional Hearing Clerk, Region 9 on June 20, 1994, against Catalina Yachts, Inc. ("Respondent") whose place of business is located at 21200 Victory Boulevard, Woodland Hills, CA 91364 (hereinafter "Facility").

In the Complaint, Complainant, EPA, charged Respondent with the violation of EPCRA in seven separate counts. Counts I and II charge Respondent with failure to submit toxic release inventory forms, ("Form Rs") covering the usage of acetone for the years 1988 and 1989 in violation of Section 313 of EPCRA [42 U.S.C. § 11023] and 40 C.F.R. Part 372. Counts III through VII charge Respondent with failure to submit Form Rs covering usage of styrene for the years 1988, 1989, 1990, 1991 and 1992, also in violation of Section 313 of EPCRA and 40 C.F.R. Part 372.

Respondent's Answer To Civil Complaint ("Answer") was filed with the Regional Hearing Clerk, Region 9, on July 14, 1994. In the introductory paragraph of the Answer, Respondent admitted that it is a "person", an "owner or operator" of the Facility, the SIC for the Facility is 3732 and that there are ten or more "full-time employees" at the Facility. The introductory paragraph concludes with a general denial which reads as follows:

///

> Respondent is continuing to review its records and is at the present time unable to respond to the remaining allegations in . . . the Complaint and, therefore, denies each and every remaining allegation. Respondent reserves the right to amend its Answer when it completes its review.

Respondent's response to each of the seven counts which follows, is a denial based on the review of its records. There is no indication that Respondent has ever completed "its review" of the records.

On October 4, 1994, EPA filed a Motion for Accelerated Decision as to liability based on EPA's contention that there were no material issues of fact to be decided at a hearing. In due course Respondent filed their opposition to Complainant's motion requesting the Trier of Fact to either dismiss the action, determine liability with no civil penalty or set a hearing to determine an appropriate civil penalty.

By his order dated January 10, 1995, the Presiding Administrative Law Judge granted Complainant's motion for accelerated decision as to liability and set the stage for a hearing on whether a civil penalty is to be assessed and if so, the amount. The hearing on the issue of a civil penalty was held on January 28, 1997, pursuant to the order of the Presiding Administrative Law Judge dated September 4, 1996. Respondent was represented at the hearing by Attorneys James L. Meeder and

Eileen M. Nottoli of Beveridge and Diamond. Complainant was represented by David M. Jones, Assistant Regional Counsel, EPA.

II. PROPOSED FINDINGS OF FACT.

1. The Complainant by delegation from the Administrator of the United States Environmental Protection Agency and the Regional Administrator, EPA, is the Director of the Air and Toxics Division, EPA. Complaint ¶1. Regional Order No. 1260.14 dated January 14, 1997, redelegated the authority to bring this action to the Director, Cross-Media Division.

2. The Respondent is Catalina Yachts, Inc. a boat building company. Complaint ¶1; Transcript at 4, line 23, Transcript at 79 and 80.

3. The Respondent is a person as defined by Section 329(7) of EPCRA. Complaint ¶5.

4. The Respondent is an owner or operator of a facility as defined by Section 329(4) OF EPCRA which is located at 21200 Victory Boulevard, Woodland Hills, CA 91364. Complaint ¶7; Transcript at 5, line 11.

5. The Facility employs ten or more full-time employees as defined by 40 C.F.R. § 372.3. Complaint ¶8; Transcript at 5, lines 13 and 14, at 80, lines 12 to 15, at 81, lines 5 to 7; Exhibit A, p.5 ¶10, Exhibit A,p.6 ¶10 and Ex 4.

6. The Facility is classified in Standard Industrial Classification 3732. Complaint ¶9; Transcript at 5, lines 12 and 13; Exhibit A,p. 5 ¶10, Exhibit A,p. 6 ¶10 and Ex 4.

7. An authorized EPA representative inspected the Facility on November 15, 1993. Complaint ¶6; Transcript at 81, line 8; Exhibit A,p. 3 ¶6.

8. The November 15, 1993, inspection of the Facility revealed that in calendar years 1988 and 1989, Respondent "otherwise used" acetone CAS No. 67-64-1 in excess of 10,000 pounds. Complaint ¶13 and ¶18.

9. Acetone is a toxic chemical listed under 40 C.F.R. § 372.65. Complaint ¶13 and ¶18.

10. Respondent failed to submit a Form R for calendar years 1988 and 1989, respectively, for acetone to the Administrator, U.S. Environmental Protection Agency and the State of California by July 1 of 1989 and 1990, respectively. Complaint ¶14 and ¶19; Exhibit A,p.4 ¶8.

11. The November 15, 1993, inspection of the Facility revealed that in calendar year 1988 Respondent processed styrene, CAS No. 100-42-5, in excess of 50,000 pounds. Complaint ¶23.

12. The November 15, 1993, inspection of the Facility revealed

that in calendar years 1989, 1990, 1991 and 1992, Respondent processed styrene, CAS No. 100-42-5 in excess of 25,000 pounds. Complaint ¶28, ¶33, ¶38 and ¶43.

13. Styrene is a toxic chemical listed under 40 C.F.R. § 372.65. Complaint ¶23, ¶28, ¶33, ¶38 and ¶43.

14. Respondent failed to submit a Form R for calendar years 1988, 1989, 1990, 1991 and 1992, respectively, for styrene to the Administrator, U.S. Environmental Protection Agency and the State of California by July 1 of 1989, 1990, 1991, 1992 and 1993, respectively. Complaint ¶24, ¶29, ¶34, ¶39 and ¶44; Exhibit A,p.4 ¶8.

15. The Order Granting Motion For Accelerated Decision As To Liability dated January 10, 1995, established that Respondent violated EPCRA as alleged in the Complaint and that the only issue remaining for hearing is the amount of the civil penalty to be assessed. Transcript at 6, lines 6 to 19; Exhibit A 6 ¶11.

16. Respondent had annual sales of approximately $40 million at the time that the Complaint was filed. Exhibit A,p.6 ¶10 and Exhibit 4.

17. Respondent had more than fifty employees at the time that the Complaint was filed. Complaint ¶11; Exhibit A,p.6 ¶10 and Exhibit 4.

18. The proposed civil penalty set forth in the Complaint was calculated in accordance with the August 10, 1992, Enforcement Response Policy for Section 313 and Section 6607 of the Pollution Prevention Act (1990)(hereinafter "ERP") Complaint ¶9; Exhibit A, p.4 ¶9 and Exhibit 3.

19. In calculation of the civil penalty in this action, EPA took into account:

a) the nature,

b) circumstances,

c) extent, and

d) gravity of the violation(s);

and, with respect to the violator,

a) annual gross sales,

b) number of employees, and

c) quantity of chemicals processed (styrenne) or otherwise used (acetone). Complaint ¶9; Transcript at 13 and 14, Transcript at 16, lines 1 to 9, Exhibit R-2, at 29, lines 19 to 25, Transcript at 30, lines 1 to 25, Transcript at 31, lines 1 to 7, Transcript at 32, lines 16 to 25, Transcript at 33, lines 4 to 15, Transcript at 34, lines 9 to 20, Transcript at 35, lines 11 to 25, Transcript at 36, lines 1 to 24, Transcript at 37, lines 1 to 25, Transcript at 38, lines 1 to 25, Transcript at 39, lines 1

to 8; Exhibit A,p.4 ¶9 and Exhibit 3, Exhibit A,p.4 ¶10, Exhibit A,p.5 ¶8.

20. The purpose of the ERP is to ensure that the U.S. Environmental Protection Agency takes appropriate enforcement actions in a fair and consistent manner as well as to ensure that the enforcement response is appropriate for the violation. Transcript at 16, lines 14 and 15, Exhibit R-2 p.1.

21. In calendar years 1988 and 1989, Respondent used more than ten times the 10,000 pound threshold for otherwise use of acetone. Complaint ¶13 and ¶18.

22. Respondent submitted the Form Rs to EPA for calendar years 1988 and 1989, for acetone in May, 1994, more than one year after July 1, 1989 and July 1, 1990, respectively. Exhibit A,p.7 ¶14.

23. In calendar year 1988, Respondent processed more than ten times the 50,000 pound threshold for styrene. Complaint ¶23.

24. In calendar year 1989, 1990, 1991 and 1992, respectively, Respondent processed more than ten times the 25,000 pound threshold for styrene. Complaint ¶28, ¶33, ¶38 and ¶43.

25. Respondent submitted the Form R to EPA for calendar year 1988, for styrene in May, 1994, more than one year after the due date of July 1, 1989. Transcript at 39, lines 20 and 21; Exhibit A,p.7 ¶14.

26. Respondent submitted the Form R to EPA for calendar year 1989, for styrene in May, 1994, more than one year after the due date of July 1, 1990. Transcript at 39, lines 20 and 21; Exhibit A,p.7 ¶14.

27. Respondent submitted the Form R to EPA for calendar year 1990, for styrene in May, 1994, more than one year after the due date of July 1, 1991. Transcript at 39, lines 20 and 21; Exhibit A,p.7 ¶14.

28. Respondent submitted the Form R to EPA for calendar year 1991, for styrene in May, 1994, more than one year after the due date of July 1, 1992. Transcript at 39, lines 20 and 21; Exhibit A,p.7 ¶14.

29. Respondent submitted the Form R to EPA for calendar year 1992, for styrene more than eleven months after the due date of July 1, 1993. Transcript at 39, lines 20 and 21; Exhibit A,p.7 ¶14.

30. Respondent is currently in compliance with Section 313 of EPCRA. Exhibit A,p.7 ¶14.

31. Respondent submitted the delinquent Form Rs for acetone and styrene to the State of California. Exhibit A,p.7 ¶14.

32. Respondent does not have a history of past violations of Section 313 of EPCRA. Exhibit A,p.5 ¶8; Transcript at 32, lines

21 to 25, Transcript at 97, lines 10 to 17.

33. Region 9 has conducted outreach workshops under Section 313 of EPCRA. Notice of the workshops is mailed to companies that may be required to report under EPCRA. Based on the databases maintained by EPA, Respondent was on the mailing list for these mailings at least in 1987 and 1993. Exhibit A,p.9 ¶17.

34. Information contained in the toxic chemical release inventory is used by both EPA and local communities for purposes of emergency planning and pollution prevention planning. Exhibit A,p.8 ¶16.

35. Acetone was delisted effective June 16, 1995. Exhibit A,p.9 ¶19; Transcript at 34, lines 6 to 8.

36. Other penalty adjustment factors in the ERP that were considered by Complainant but found inapplicable to the calculation of the proposed civil penalty in the Complaint were voluntary disclosure, Respondent's attitude, inability to pay and other factors as justice may require. Exhibit A,p.5 ¶8; Transcript at 34, line 14 to 20, Transcript at 36, lines 19 to 24, Transcript at 38, lines 2 to 39.

37. A hearing was held on January 28, 1997, in San Francisco, CA before the Honorable Spencer T. Nissen, Chief Administrative Law Judge (Acting).

38. At the hearing Respondent presented five past projects which included:

1) Conversion from the use of acetone to MBE as a solvent at the Facility,[1]

2) Termination of the anti-fouling bottom paint service,[2]

3) Conversion from sprayed gel-coat to brushable gel-coat,[3]

4) Shift from spirit to water-based contact cement[4] and

5) Plant tours and an open house to reduce public fears.[5]

III. PROPOSED CONCLUSIONS OF LAW.

1. Respondent's failure to submit a Form R for acetone for 1988 by July 1, 1989, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

2. Respondent's failure to submit a Form R for 1989 for acetone by July 1, 1990, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

3. Respondent's failure to submit a Form R for 1988 for Styrene by July 1, 1989, is a violation of Section 313 of EPCRA [42

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[1] Transcript at 104, line 19.

[2] Transcript at 113, line 12.

[3] Transcript at 114, line 23.

[4] Transcript at 117, line 4.

[5] Transcript at 99, line 21.

U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

4. Respondent's failure to submit a Form R for 1989 for Styrene by July 1, 1990, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

5. Respondent's failure to submit a Form R for 1990 for Styrene by July 1, 1991, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

6. Respondent's failure to submit a Form R for 1991 for Styrene by July 1, 1992, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

7. Respondent's failure to submit a Form R for 1992 for Styrene by July 1, 1993, is a violation of Section 313 of EPCRA [42 U.S.C. § 11023] and of the requirements of 40 C.F.R. Part 372.

8. Evidence of past projects presented by Respondent at the hearing fails to meet the guidance presented by Environmental Appeals Board in *In re: Spang & Company*(1995), EPCRA Appeal Nos. 94-3 & 94-4. The past projects also do not qualify as supplemental environmental projects. No credit will be allowed against the civil penalty to be assessed against Respondent.

9. A penalty of one hundred sixty-two thousand five hundred dollars, the proposed penalty set forth in the Complaint after allowance for the delisting of acetone, is appropriate for the

violations of EPCRA alleged in the Complaint, based upon the nature, extent and circumstances of the violations.

IV. THE PROPOSED PENALTY IS CONSISTENT WITH THE INTENT AND PURPOSE OF EPCRA.

a. The Purpose of EPCRA is to Keep Communities Informed About Toxic Chemical Releases.

The purpose of Section 313 of EPCRA reporting is to gather information on the releases of certain chemicals to the environment and to make that information available to the public. *In re: Riverside Furniture Corp.* (1989)[6], Docket No. EPCRA-88-H-VI-406S, p.10; 40 C.F.R. § 372.1. The chemical release information collected through the Form Rs is compiled and entered into a centralized database. The integrity and value of the Toxic Chemical Release Inventory is entirely dependent on accurate and timely reports submitted by the regulated community. Riverside Furniture, at 10 - 11. "[T]he filing of such reports was intended, in this as in other programs, to be timely, complete and accurate. The success of EPCRA can be attained only

[6] At the time that *Riverside Furniture* was filed and decided the Enforcement Response Policy For Section 313 of the Emergency Planning and Community Right to Know Act also known as Title III of the Superfund Amendments and Reauthorization Act (SARA) dated December 2, 1988, was in place. *Riverside*, p.4.n.1.

through voluntary, strict and comprehensive compliance with the Act and regulations which recognize that achievement of such compliance would be difficult and that a lack of compliance would weaken, if not defeat, the purposes expressed." *Riverside Furniture*, at 10.

Over 300[7] chemicals and chemical compounds were subject to reporting at the time the Complaint was filed. These are among the most common chemical substances used in industry. Many of the chemicals are acutely toxic, others are chronic toxins or carcinogens. All of the chemicals on the list have some associated adverse health or environmental effect. Some are specifically implicated in causing depletion of the earth's ozone layer.

The Toxic Chemical Release Inventory is the only source of information pertaining to the chemicals reported which has been specifically mandated by the Congress to be directly accessible to the public. The information resides in a publicly accessible on-line computerized database and is made available to the public through annual press releases by EPA, national reports and

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[7] At the time that Respondent's Form Rs that are the subject of the Complaint were due, 40 C.F.R. § 372.65 required reporting on over 300 chemicals and chemical categories. The list was expanded in 1994.

reports provided by EPA to the states and communities throughout the nation. Data from the Inventory is also available in many cities in their public libraries.[8]

The Toxic Chemical Release Inventory is used by EPA and local communities for emergency planning and pollution prevention planning. EPA uses this information to guide the direction of environmental programs and to regulate the amount of toxic chemicals that may be released to the environment. Other programs such as the Pollution Prevention Initiative and the Waste Minimization Project, use the Inventory to highlight priority industries where toxic and carcinogenic chemicals are being released and to identify individual facilities within a given industry that have particularly high or particularly low releases of specific chemicals.

The regulatory scheme of EPCRA reflects Congressional concern that accurate information on both accidental and non-accidental releases of toxic chemicals should be available to the community, to states and to the Federal government. Although the concern about the hazardous chemicals used by neighborhood companies was heightened by the 1984 chemical tragedy in Bhopal,

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[8] Transcript at 42, lines 11 to 25, Transcript at 43, lines 1 to 11.

India, where a release of toxic gas killed and injured thousands of people, Congress was concerned as well about the insidious effects of routine releases of toxic chemicals that are not immediately life-threatening. In an effort to address these concerns, Congress passed EPCRA in 1986 to help communities within the United States to deal safely and effectively with the many hazardous substances that are used throughout our society.

In discussing the concept of such a reporting requirement during a Senate debate on an early version of the provision, Senator Robert T. Stafford of Vermont stated:

> The intent behind this amendment is to require manufacturing facilities handling substantial quantities of toxic chemicals to report the annual quantities of these chemicals they dump into the environment. These reports when compiled will constitute an inventory which tells us where the toxic chemicals are and where they are being released into the environment. Such an inventory will be a valuable tool for environmental regulators, for the health professionals, the concerned public and the companies themselves.
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> ****
>
> After the Bhopal disaster and the continuing litany of chemical accidents in this country, the public wants to know and the public has a right to know about the releases of toxic chemicals, deliberate releases that occur every day as well as accidental releases. This amendment, Mr. President, will provide that information. 131 Cong.Rec. S11772 (daily ed. Sept. 19, 1985) (Statement of Sen. Stafford).

During that Senate debate, Senator Frank R. Lautenberg of New Jersey addressed the way in which the information collected

by such report would be used:

> This inventory is to be used by State and Federal agencies to improve toxic chemical management by monitoring use and tracking releases of these substances. An effective inventory will help us better understand the flow of toxic into the environment and thereby aid in the preventing future Superfund sites. It will also provide critical information to Federal and State air, water and hazardous waste programs to track compliance and enforcement efforts within these programs . . . .[S]uch information can help inform and direct research efforts. Finally, Mr. President, the inventory will provide the Government and the public with information about daily and routine exposure to toxic in our environment--something essential to protecting the public health. 131 Cong.Rec. S11776 (daily ed. Sept. 19, 1985) (Statement of Sen. Lautenberg).

Likewise, during the House debate over an early version of the reporting requirements, Representative Gerry Sikorski of Minnesota recognized the need for such information, stating:

> We know that the vast majority of dangerous exposure to hazardous chemicals is through long-term, routine or regular releases, not the dramatic Bhopal kind of incidents. The effect of exposure to these chemicals is not discernible overnight . . . .
>
> ****
>
> The millions of Americans in thousands of neighborhoods, your neighborhoods, exposed to toxic chemicals, your constituents and your neighborhoods have a fundamental right to know about the hazardous chemicals, acute and chronic, that are released into the environment hour after hour, day after day, year after year. They have a right to know where the strange odors are coming from. They have a right to know what toxic chemicals are mixed in the soil their kids play on and they have a right to know what poisonous chemicals are contaminating their drinking water. 131 Cong. Reg. H11204-5 (daily ed. Dec. 6, 1985) (Statement of Rep.

Sikorski).

Respondent in this case should be assessed a substantial penalty because its failure to timely file Form Rs goes to the heart of the purpose of EPCRA--the community's right to know about releases of toxic chemicals.[9]

b. EPA Considered the Statutory Factors in Proposing the Civil Penalty.

1. Factors Related to the Violation.

The applicable statutory factors are found in Section 16 of

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[9] EPCRA 'is intended to encourage and support emergency planning efforts at the State and local level and provide residents and local governments with information concerning potential chemical hazards present in their communities.' *Emergency Planning and Community Right to Know Programs, Interim Final Rule,* 51 Fed.Reg. 41,570 (Nov. 17, 1986). Section 313 is contained in EPCRA Subtitle B, which 'provides the mechanism for community awareness with respect to hazardous chemicals present in the locality. This information is critical for effective local contingency planning.' *Id.* A facility's failure to comply with EPCRA's annual toxic chemical reporting requirement for *each* chemical subject to the requirement potentially leaves a gap in the information available to federal, state and local planning officials. The per-violation penalties contemplated by EPCRA § 325(c)(1) are the means preferred by Congress to deter information gaps and redress violations, and **the result may be substantial penalties for multiple violations.** (Footnote Omitted) [Emphasis Added]

In re: Pacific Refining Company(1994), EPCRA Appeal No. 94-1, pp.17-18.

the Toxic Substances Control Act (TSCA), as amended[10] [15 U.S.C. § 2615] which draws a distinct demarcation between factors relating to the violation itself and factors relating to the violator. For the violation itself, Section 16 of TSCA provides that in determining the amount of the civil penalty EPA must take into account the "nature, circumstances, extent and gravity of the violation or violations." [15 U.S.C. § 2615(a)(2)(B)]. The meaning of each of these terms will be explored in turn.

The commonly understood meaning of "nature" is the most appropriate interpretation. Webster's New World Dictionary defines nature as "[t]he essential character of a thing; quality or qualities that make something what it is; essence . . ." . As EPA noted in its 1980 TSCA penalty policy, "the nature (essential character) of a violation is best defined by the set of requirements violated." 45 Fed.Reg. 59770, 59771.

In this case, the nature of the EPCRA violations was the Respondent's failure to provide timely, complete and accurate

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[10] With respect to civil penalties under EPCRA, Section 325 of EPCRA [42 U.S.C. § 11045] provides in part:

> Any civil penalty under this subsection shall be assessed and collected in the same manner, and subject to the same provisions, as in the case of civil penalties assessed and collected under section 2615 of Title 15. 42 U.S.C. § 11045(b)(2).

information to EPA and the State of California as required by Section 313 of EPCRA [42 U.S.C. § 11023].[11] Respondent filed each of the Form Rs required by the statute over one year after the date that the same were due and after the November, 1993, inspection during which the Facility's non-compliant status was uncovered.[12] Respondent's failure to provide the Form R information in a timely manner deprived the public of information on the use and releases of chemicals in the community and, consequently, deprives both individuals and government organizations of the opportunity to take steps to reduce the risks posed by these releases and thereby, could result in increased risk to the local community.

"Circumstances" is reasonably interpreted in the context of the TSCA penalty assessment factors as reflecting the probability of harm occurring as a result of the violation. See 45 Fed. Reg. 59770, 59772. Under Section 313 of EPCRA the circumstances of the violations "takes into account the seriousness of the violation as it relates to the accuracy and availability of the information to the community, to the State of California and to

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[11] Transcript at 13, lines 8 to 25.

[12] Exhibit A 7 ¶15.

the Federal government." ERP, p.8. The circumstances of the violations in this case is the failure to report in a timely manner.[13] This is the most significant of the violations of Section 313. Failure to report is classified as the most serious violation of Section 313 of EPCRA because such failure deprives the public of information on chemical releases which may have a significant affect on public health and the environment. In the case at bar toxic release information for the year 1988, Counts I and III, was not made available to the public for approximately five years.

The natural meaning of the term "extent" suggests a consideration of the degree, range or scope of a violation. In the context of Section 313 of EPCRA, EPA interprets this "extent" to take into consideration the quantity of a listed toxic chemical a facility processes, manufactures or otherwise uses. Facilities that process, manufacture or otherwise use ten or more times the reporting threshold for the Section 313 chemicals create a greater potential of exposure to the employees at the facility, the public and the environment. The amount of toxic chemicals processed, manufactured or otherwise used should be

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[13] Transcript at 16, lines 1 to 9.

considered in assessing a penalty under EPCRA because the major goal and intent of EPCRA is to make available to the general public, on an annual basis, a reasonable estimate of the toxic chemicals emitted into their local communities from regulated sources.[14] ERP, p.9.

Another factor in determining the extent of the violation is size of the respondent's business. The size of the respondent's business reflects the proposition that a smaller penalty will have the same deterrent effect on a small company, as a large penalty on a larger company. Respondent has more than 50 employees and at the time the Complaint was filed had annual sales of approximately $40 million.

The common sense meaning of "gravity" in the context of penalty assessment is the overall seriousness of a violation. In both TSCA and the ERP, EPA interprets "gravity" as a composite of other factors. For violations of Section 313 of EPCRA it is reasonable to view gravity as incorporating the considerations under the extent and circumstances elements of the violations.[15]

2. Statutory Adjustment Factors That Relate To The Violator.

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[14] Transcript at 30, lines 13 to 22.

[15] Transcript at 31, lines 12 to 17.

In the paragraphs under the heading on page 16 above, consideration was given to factors related to the violation. Section 16 of TSCA also requires the consideration of factors pertaining to the violator. These factors include: "Ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other factors as justice may require." [15 U.S.C. § 2615(a)(2)(B)]

Ability to pay generally encompasses a review of a violator's solvency and an assessment of the effect a given penalty will have on the firm's ability to continue in business. However, in an order by the Presiding Administrative Law Judge[16] rescinding an order whereby Complainant sought financial information to determine Respondent's ability to pay, Respondent stated that it was not raising ability to pay as a defense to the proposed penalty.[17] The order then stated ". . . the only reasonable interpretation of Catalina's assertion is that it is a waiver of 'ability to pay/inability to pay' as a defense to the penalty sought by Complainant . . ." .[18] No evidence has been

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[16] Order Rescinding Discovery Order dated April 1, 1996.

[17] *Id.*p.4.

[18] *Id.*

presented to date by Respondent regarding Respondent's ability to pay the proposed civil penalty or that payment of the proposed civil penalty would in any way impair Respondent's ability to continue in the boat building business. Respondent does not have any history of prior violations of EPCRA.

EPCRA has been determined to be a strict liability statute; thus, culpability is considered only when there is evidence that Respondent knowingly violated EPCRA. *Riverside Furniture*, Interlocutory Order Granting Complainant's Motion For Partial Accelerated Decision, p.5,n.2. (Intent is not an element of an EPCRA civil violations); see also ERP, p.14 ("Lack of knowledge does not reduce culpability since the Agency has no intention of encouraging ignorance of EPCRA . . . .") There is no evidence that Respondent's violations were knowing or willful. Although EPA considered the statutory factors of Respondent's ability to pay, effect on ability to continue to do business and culpability, in the case at bar, no adjustment was made based upon these factors because they were determined by EPA as inapplicable to Respondent.

The final factor in the category of statutory factors to be considered is "other factors as justice may require." It is the general practice at EPA to apply this factor during settlement

negotiations.[19] To assure national consistency the ERP has provided guidance in assessing issues which may qualify as "other factors as justice may require." The ERP factors include: new ownership for history of prior violations, borderline violations and lack of control over the violation. In the case at bar Respondent's violations are not due to a new ownership for history of prior violations. Nor are the violations borderline since Respondent used acetone and styrene at quantities well over ten times the reporting quantity threshold[20] and had over 200 employees at the time of the inspection,[21] versus 10 employees for the number of employees reporting threshold.[22] Nothing on

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[19] Transcript at 34, lines 14 to 20, and Transcript at 37, lines 5 to 18.

[20] The following is a summary of usage and threshold taken from the Complaint:

		Acetone Usage	Styrene Usage
1988	approx.	308,106 pounds	1,784,078 pounds*
1989	approx.	101,655 pounds	2,691,348 pounds**
1990	approx.		898,416 pounds
1991	approx.		624,441 pounds
1992	approx.		660,798 pounds
Threshold		10,000 pounds	50,000 pounds*
			25,000 pounds**

[21] Transcript at 81, line 7.

[22] Section 313(a) [42 U.S.C. § 11023(a)].

the record in this action shows that Respondent had less than total control over the violations. The ERP warns that "[u]se of this reduction is expected to be rare and the circumstances justifying its use must be thoroughly documented in the case file."[23]

3. EPA Also Considered The Adjustment Factors In The ERP.

In addition to the statutory factors, in assessing a penalty EPA also considers it appropriate to weigh several additional adjustment factors under the ERP. These are: voluntary disclosure, delisted chemicals, attitude and supplemental environmental projects. ERP, p.8.

The first adjustment factor, voluntary disclosure is not applicable to the case at bar because the violations were discovered as a result of an inspection.[24] ERP, p.14.

The attitude adjustment factor with its two components, cooperation and compliance, was not applied in this case because of Complainant's practice of limiting application of the factor to settlement discussions. The supplemental environmental project adjustment, like the attitude adjustment is also limited

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[23] ERP,p.18.

[24] Transcript at 58, lines 3 to 11.

in its application by Complainant to settlement discussions.[25]

The adjustment factor for delisted chemicals is applicable in this case. Acetone was delisted effective June 16, 1995, and the fixed reduction percentage in the proposed civil penalty taken from page 17 of the ERP, 25% has been applied in this document.[26]

Adjustment of the proposed civil penalty by supplemental environmental projects ("SEP") was never accomplished by the parties because an SEP was never presented by Respondent for consideration and evaluation by Complainant.

4. EPA Has Met The Burden That The Proposed Penalty Is Appropriate.

Section 22.24 of the Rules of Practice, 40 C.F.R. Part 22, places the burden of proof regarding the "appropriatness" of the penalty on Complainant. Judge Reich writing for the Environmental Appeals Board in *In re: Employers Insurance of Wausau and Group Eight Technology, Inc.* said:

> The complainant's burden under TSCA § 16 and 40 C.F.R. § 22.24 is only to demonstrate that it 'took into account'

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[25] Transcript at 37, line 25, and Transcript at 38, lines 1 to 25, and Transcript at 54, lines 11 to 20.

[26] Transcript at 54, lines 2 to 10, and Transcript at 73, lines 1 to 6.

> certain criteria specified in the statute, and that its proposed penalty is 'appropriate' in light of those criteria and the facts of the particular violations at issue. To satisfy the complainant's initial burden of going forward, it should ordinarily suffice for the complainant to prove the facts constituting the violations, to establish that each factor enumerated in TSCA § 16[27] was actually considered in formulating the proposed penalty, and to explain and document with sufficient evidence or argument how the penalty proposal follows from an application of the section 16 criteria to those particular violations.

In re: Employers Insurance of Wausau And Group Eight Technology, Inc.(1997), TSCA Appeal No. 95-6, p.33.

Complainant's initial burden, to prove the facts constituting the violations was met upon the issuance of the Order Granting Motion for Accelerated Decision dated January 10, 1995, signed by the Presiding Administrative Law Judge. The argument set forth in this Part IV.b. clearly establishes that each factor enumerated in TSCA § 16(a)(2)(B) was actually considered in formulating the penalty proposed in the action and how the penalty proposal follows from an application of the criteria set forth in Section 16(a)(2)(B) to the violations charged in the Complaint.

c. <u>The ERP Ensures That Enforcement Actions Are Fair, Uniform and Consistent</u>.

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[27] The penalty criteria set forth in Section 16(a)(2)(B) of TSCA applied in *Employers* is applicable to the instant action by virtue of Section 325(b)(2) of EPCRA which provides for Class II administrative penalties, and requires that civil penalties be assessed in the same manner and subject to the same provisions, as civil penalties are assessed under Section 2615 of Title 15.

> The Agency has issued penalty policies to create a framework whereby the decisionmaker can apply his[Sic] discretion to the statutorily-prescribed penalty facts, thus facilitating the uniform application of these factors.

In re: Mobil Oil Corp.(1994), EPCRA Appeal No. 94-2, p.30.

The ERP sets forth a comprehensive, rational and reasonable framework for applying each of the statutory factors to the facts of a case and places each type of violation in context with the other types of violations. The policy is designed to promote deterrence, fair and equitable treatment of the regulated community and swift resolution of environmental problems.

Consistency is a fundamental element of fairness in administrative adjudications, and EPA's enforcement program is credible only to the extent that penalties are assessed in a consistent manner. The use of the ERP ensures that EPCRA enforcement will be consistent nationally.

Another important consideration in assessing penalties is deterring violations: The penalty must be high enough to deter the person charged with violating EPCRA, and discourage other members of the regulated community from repeating the violation.

The ERP is based on the statutory criteria set forth in pages 17 through 26 above, with the determination of a gravity-based penalty based on the nature, extent, circumstances and gravity of the violations as set forth in a penalty matrix. Once

the gravity-based penalty is determined, upward or downward adjustments may be made to the determined amount based on statutory factors of culpability, history of prior violations, ability to continue in business and such other factors as justice may require and factors that are incorporated into the ERP such as voluntary disclosure, delisted chemicals, attitude and supplemental environmental projects. ERP, p.8. These adjustments are carefully balanced to assure that mitigating or aggravating factors appropriately influence the amount of the penalty, yet do not change the penalty disproportionately relative to other comparable violations.

The total penalty is determined by calculating the penalty for each violation on a per chemical, per year, per facility basis. ERP, p.13. This approach ensures that the public will obtain information about each and every chemical subject to EPCRA. The Trier of Fact is required to consider the ERP in assessing a penalty. 40 C.F.R. § 22.27(b); *Riverside Furniture*, p.5.

The proposed penalty set forth in the Complaint is rationally related to the harm in this case, consistent with penalties in other cases with similar fact patterns and not arbitrary and capricious.

V. PENALTY REDUCTION SHOULD NOT BE BASED UPON RESPONDENT'S ARGUMENTS THAT THE VIOLATIONS WERE UNINTENTIONAL OR THAT RESPONDENT COMPLIED WITH OTHER ENVIRONMENTAL LAWS.

Without identifying it as such, Respondent's case-in-chief was composed extensively of testimonial evidence that was designed to achieve a reduction in the civil penalty on an equitable basis through the application of the rubric, "other matters as justice may require."[28] As noted on page 24 above, the ERP teaches that the application of the factor is expected to be rare and thoroughly documented.

a. Respondent Is Charged With Knowledge Of The Law.

Respondent's sole witness at the hearing before the Presiding Administrative Law Judge on January 28, 1997, was Gerald Bert Douglas, Vice President of Catalina Yachts, Inc.[29] At the end of Mr. Douglas' direct testimony the following exchange took place:

> Mr. Meeder: Would you, as my last question, simply explain to the Court why Catalina Yachts did not file Form Rs for the years in question with regard to its Woodland Hills' facility?
>
> Mr. Douglas: Mainly because I didn't know about it. I mean,

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[28] *Supra, p.24.*

[29] Transcript at 78, line 23 and at 79, line 13.

> I am probably the culprit, it is my responsibility to know about these forms, and I just didn't know.[30]

Respondent's argument that the penalty should be reduced because Respondent was not aware of EPCRA at the Facility and that its violation of EPCRA was unintentional is without merit because Respondent is charged with knowledge of the law and should have been aware of the requirements of EPCRA.

It is well settled law that all persons are charged with knowledge of United States codes as well as regulations and rules promulgated thereunder and published in the Federal Register. 44 U.S.C. § 1507; *Federal Crop Ins. v. Merrill*, (1947), 332 U.S. 380, 384-385; *T.H. Agriculture and Nutrition Co.* (1984), TSCA VII-83-T-191, p.11; *Colonial Processing, Inc.* (1991), Docket No. II EPCRA-89-0114, pp. 20-21; *Riverside Furniture*, p.5.

Further, the fact that Respondent was unaware of EPCRA does not provide a basis to reduce a penalty. Apex Microtechnology (1993), Docket No. EPCRA-09-92-00-07, p.18. EPCRA was enacted into law in 1986, almost seven years before the inspection which led to the filing of the Complaint.[31] Since that time EPA has

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[30] Transcript at 119, line 25 and at 120, lines 1 to 7.

[31] Exhibit A,p.3 ¶7, and Exhibit 2.

conducted workshops as EPCRA outreach. Since enactment of EPCRA the Agency has conducted a minimum of two compliance assistance workshops in California each year. At least one of these workshops was held in Southern California. Notice of the workshops were mailed out to companies like Respondent who had more than 100 employees by EPA every year beginning in 1987 and continuing at least through 1995. The database maintained by EPA shows that Respondent was on the mailing list for these mailings at least in 1987 and 1993.[32]

Based upon the outreach programs by EPA, Respondent should have known the reporting requirements of EPCRA. *Riverside Furniture*, p.7. (The success of outreach programs is predicated on what the respondent should have known as a result of outreach efforts.) "The failure of a corporation to know what could have been known in the exercise of due diligence amounts to knowledge in the eyes of the law." *Riverside Furniture, p.7,n.2.*

In addition, public policy requires that a penalty not be

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[32] See attached letters dated March 14 and 22, 1995, addressed to David M. Jones, Assistant Regional Counsel, signed Robert D. Wyatt for Beveridge & Diamond, with a copy of each letter to Spencer T. Nissen; and letter dated March 29, 1995, addressed to Robert D. Wyatt, Esquire, Beveridge & Diamond, signed David M. Jones, Assistant Regional Counsel, with a copy to Spencer T. Nissen, Administrative Law Judge regarding "outreach information".

reduced on the basis of a respondent claiming to be ignorant of the law. Such reductions would encourage ignorance of the law and should be avoided. This is especially true with regard to Respondent whose place of business is located in a suburban Los Angeles community.[33] Los Angeles County is a major metropolitan area providing immediate communications with the world on every level.

Since enactment of EPCRA EPA has conducted numerous EPCRA Workshops in the Los Angeles and Burbank areas. Either location is close to the Facility. Respondent apparently ignored the Workshop announcement on a consistent basis. Therefore, no penalty reduction should be made on the basis of Respondent's lack of knowledge of EPCRA.

b. Compliance With Other Environmental Laws Does Not Support A Reduction In Penalty.

Respondent has argued that the penalty should be reduced in this matter based on Respondent filing reports with local agencies on the use of resins containing styrene, the use of acetone and air emissions resulting from such use.[34] In support

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[33] Transcript at 79, lines 1 to 10.

[34] See Respondent's Exhibits R-3, 4 and 5.

of these claims Respondent has submitted to Complainant and entered as an exhibit on the record of this proceeding a document marked as Exhibit R-3 which was submitted to the Los Angeles City Fire Department by a letter dated February 20, 1989, signed Brian Parker, Catalina Yachts.[35] In addition, two other documents submitted to South Coast Air Quality Management District covering Respondent's emissions data for the years 1988 and 1989 were entered on the record as Exhibit R-4 and R-5. According to Respondent the forms submitted to the Fire Department and the Air Quality Management District provided similar information as that required on Form Rs under EPCRA.

Section 313 of EPCRA requires the submission of data that is chemical specific. The information submitted on the Form Rs is not only chemical specific but, includes releases to air (fugitive and stack), water and land, and treatment on site and transfers off site.[36]

The testimony of Complainant's witness, Dr. Pam Tsai, shows that with respect to Exhibit R-3, releases to air, water or land

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[35] Transcript at 19, lines 24 and 25, Transcript at 20, lines 1 to 3, Transcript at 21, lines 20 to 25, Transcript at 22, lines 1 to 15.

[36] Transcript at 48, lines 12 to 25, at 49, lines 1 to 3.

are not shown. In addition, R-3, unlike Form R, does not provide information as to waste management practices at the Facility or information with respect to off site-site treatment, recycling or disposal of the chemicals.[37]

As for Exhibit R-4, the information reported in this exhibit is limited to releases to the air. In addition, the information given is limited to organic gases. The Exhibit R-4 form contains no information which will inform the public as to the releases of styrene.[38]

The information submitted by Respondent on Exhibit R-5 does not provide the same information as the Form R. The information provided is not compiled in a national database made available to the public. The form contains information regarding styrene emissions, but is silent as to acetone emissions.[39]

The information submitted by Respondent in lieu of the Form Rs does not contain the comprehensive information that is to be reported under Section 313 of EPCRA. Compliance with other environmental laws such as the laws of the State of California or

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[37] Transcript at 48, lines 12 to 25, at 49, lines 1 to 3.

[38] Transcript at 49, lines 23 to 25, at 50, lines 1 to 4.

[39] Transcript at 50, lines 5 to 17.

local agencies, does not relieve Respondent of its obligation to comply with EPCRA, nor does it provide a basis for reduction or mitigation of the penalty. *In re: Apex Microtechnology, Inc.* (1993), Docket No. EPCRA-09-92-00-07, pp. 5-6; *In re: Pacific Refining Co.* (1994), EPCRA Appeal No. 94-1, pp. 18-19 and n.19.

In *Apex*, respondent submitted reports to an air district providing information regarding annual usage of the same chemicals that it was required to report on under EPCRA. *Apex*, p.5. *Apex* argued, as Respondent here, that although it did not file its Form Rs, it did in fact disclose the equivalent information. *Apex*, p.6. The tribunal deciding that action rejected the argument and held that "there is no basis in the ERP to support a reduction or mitigation of the penalty because other reports were filed with local authorities." *Apex*, p.14. see also *Pacific Refining Co*, p.19 and n.19.

Further, Section 313 of EPCRA requires that Respondent provide the information to EPA and to the State of California, not just to local agencies. see e.g. *Pacific Refining Co.*,pp. 18-19. Congress recognized that EPCRA would collect information that might have already been reported under other environmental laws, but passed EPCRA so that the information would be comprehensive and easy to access by the general public. In the

debate on the bill, Senator Lautenberg stated: "The information maybe scattered in air files, water files, and on RCRA manifest forms, for example, but not pulled together in one place to provide a complete usable picture of total environmental exposure." 131 Cong.Rec. S11776 (daily ed. Sept. 19, 1985) (statement of Sen. Lautenberg).

Thus, no reduction in the penalty should be made by the Trier of Fact based upon the fact that Respondent filed other reports with local agencies.

VI. PENALTY REDUCTION SHOULD NOT BE BASED ON RESPONDENT'S CLAIMS OF EXPENDITURES CONSTITUTING "PAST PROJECTS."

The testimonial evidence on the record of this proceeding by Respondent regarding five past projects requires the Presiding Administrative Law Judge to determine whether, as a matter of equity, these past projects are to be recognized and the civil penalty assessed against Respondent reduced as a result thereof under the rubric "other factors as justice may require."[40]

a. Testimonial Evidence Of Past Acts.

Respondent's witness, Gerald Douglas, testified extensively at the hearing regarding what was described at one time as

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[40] See discussion of ERP guidance in applying this factor p.24 *supra*.

mitigating factors[41] and at other times as environmentally beneficial expenditures.[42] These mitigating factors included voluntarily adopting the use of a chemical solvent known as MBE as a substitute for acetone. Mr. Douglas testified that the change from acetone to DBE was accomplished at a material cost to Respondent and resulted in a substantial reduction of VOC emissions.[43]

Mr. Douglas also testified regarding a service performed by Respondent identified as anti-fouling bottom painting. The painting of boat bottoms was voluntarily terminated by Respondent in 1994 resulting in a loss of revenue to Respondent because customers were charged a fee for having the bottom of their boats painted.[44]

Mr. Douglas described the use of a brushable gel-coat to be distinguished from spray gel-coat in the manufacturing of boats at the Facility. According to Mr. Douglas, the use of the brushable gel-coat product resulted in a reduction of styrene

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[41] Transcript at 107, line 24.

[42] Transcript at 117, lines 1 to 3, Transcript at 118, lines 13 to 17, Transcript at 119, lines 23 and 24.

[43] Transcript at 109 to 112.

[44] Transcript at 113, lines 18 to 25, Transcript at 114, lines 1 to 14.

emissions, but increased the per unit costs to manufacture the boats.[45]

Mr. Douglas' testimony regarding the emission reductions effected at the Facility through manufacturing operations changes concluded with the description of their shift from spirit to water-based contact cement. According to Mr. Douglas, the water-based cement, though more expensive than the spirit-based contact cement, resulted in no emissions of VOCs resulting from the application of the water-based contact cement.[46]

When asked why the foregoing four changes were undertaken by Respondent, Respondent's witness gave three reasons. The reasons given were: healthier work environment, minimize nuisance odors in the neighborhood and to promote good public relations. Knowledge of these projects is expected to please their boat-buying customers. No claim was made at the hearing by either the witness or Respondent's counsel that any of the projects or expenditures mentioned were presented to EPA at any time prior to the hearing for evaluation by EPA as environmentally beneficial expenditures.

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[45] Transcript at 114, lines 15 to 25, Transcript at 115, lines 1 to 25, Transcript at 116, at lines 1 to 25

[46] Transcript at 117, lines 14 and 15.

Mr. Douglas was asked on direct examination to describe the "ourtreach programs you have to local communities with regard to informing them concerning the nature of your operations and the materials that are used in your facility."[47] This statement by counsel in the form of an interrogatory introduced the subject of tours at the Facility.

Mr. Douglas testified that most people who went on the tours were concerned about odors and that the source of the odors was the styrene used in the manufacture of the boats.[48] According to Mr. Douglas the tours have been going on at the Facility since 1986. The tours are every Thursday at 4:00 o-clock p.m. and last approximately one hour. There are from ten to twenty people for every tour and they are people from the surrounding community as well as boat owners interested in observing a boat manufacturing operation.[49]

Mr. Douglas described a weekend open house at the Facility which took place sometime in 1991. This was a two day event that according to Mr. Douglas, was intended to make the neighborhood

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[47] Transcript at 99, lines 21 to 24.

[48] Transcript at 101, lines 10 to 18.

[49] Transcript at 101, lines 20 to 22, Transcript at 102, lines 1 to 25, Transcript at 103, lines 1 to 8.

aware of the manufacturing operations at the Facility.

b. Respondent's Past Projects Do Not Qualify As Supplemental Environmental Projects.

The past projects discussed by Respondent's witness do not meet the criteria of an environmentally beneficial expenditure that is recognizable under the Interim Revised EPA Supplemental Environmental Projects Policy effective May 8, 1995. That Policy defines supplemental environmental projects as "environmentally beneficial projects which a . . . respondent agrees to undertake **in settlement of an enforcement action**, but which the . . . respondent is **not otherwise legally required to perform**."[50] [Emphasis found in the Text]

The expenditures which were the subject of Respondent's case-in-chief are not related to any settlement of the case at bar and were not made in accordance with the Interim Revised EPA Supplemental Environmental Projects Policy effective May 8, 1995, or the policy which the May 8, 1995, policy supersedes. All of the expenditures introduced through the testimony of Respondent's witness were commenced at some time prior to the hearing.

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[50] Section B. Definition and Key Characteristics Of A SEP, Interim Revised EPA Supplemental Environmental Projects Policy, Effective May 8, 1995, p.3.

The Revised SEP Policy provides a definition for "in settlement of an enforcement action" which "means: 1)EPA has the opportunity to help shape the scope of the project **before** it is implemented; and 2) the project is not commenced until after the Agency has identified a violation." [Emphasis Added][51] The conversion from acetone to another solvent, the tours of the Facility and open house were commenced prior to the November, 1993, EPA inspection of the Facility. All of the other past projects were started at sometime after the inspection and prior to the hearing. At no time were the projects presented to EPA to help shape the scope of the projects prior to their implementation as provided in the Revised SEP Policy.

c. Respondent Has Failed To Meet The Proof Standard To Obtain Credit For Past Acts.

The expenditures discussed by Respondent's witness may be classified as "past acts." The Environmental Appeals Board dealt with expenditures which are past projects in *Spang & Company*[52] and set forth in their decision future guidance for the Agency. Pertinent portions of the Board's guidance applicable to the case

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[51] Revised SEP Policy,p.4.

[52] *In re: Spang & Company*(1995), EPCRA Appeal Nos. 94-3 & 94-4,pp.58-62.

at bar are:

> . . .[T]he past acts of violators have historically been approprite for consideration when assessing a penalty. . . [t]he greatest weight should go to completed projects **for which there is tangible evidence** of significant environmental benefits.[Emphasis Added]

Spang & Company, p.60.

> [T]he evidence of environmental good deeds must be clear and unequivocal, and the circumstances must be such that a reasonable person would easily agree that not giving some form of credit would be a manifest injustice.

Spang & Company, p.59.

> Whether a project warrants a penalty adjustment, and if so, how much, will of course depend upon the evidence in the record. If a respondent claims that justice requires consideration of steps taken and monies spent on a project, a respondent needs to produce evidence of those steps and expenditures. The snapshot provided by the evidence in the record will provide the factual basis that will enable the presiding officer to determine whether justice warrants a penalty reduction for those steps and expenditures, and if so, how much. Absent such evidence, there is no factual basis for concluding that the calculated penalty will produce an injustice.

Spang & Company, p.61.

Complainant urges the Presiding Administrative Law Judge to find that Respondent failed to provide clear and unequivocal evidence to qualify the projects for penalty reduction as past acts under the *Spang* guidance for the following reasons:

1. <u>Conversion from acetone to MBE</u>.

The first of five past projects described by Respondent's witness at the hearing was Respondent's voluntary efforts "to

reduce hazardous chemical use in emissions at" the Facility by switching from acetone use as a solvent[53] "to a material called DBE."[54]

With the exception of the letter dated September 28, 1994, signed Richard S. Pepiak, Sales Representative for M. A. Hannna Resin, Distributor, entered as Respondent's Exhibit R-6, all of the evidence presented by Respondent in support of the conversion to MBE project, was oral. The Pepiak letter contains one claim regarding reduced emissions at the Facility. Overall the letter is more in the nature of a sales document for MBE than proof offered in support of Respondent's conversion project.

Spang at page 61, set forth above, teaches that "[w]hether a project warrants a penalty adjustmet, and if so, how much, . . . depends upon the evidence in the record. If a resondent claims that justice requires consideraton of steps taken and monies spent on a project, a respondent needs to produce evidence of those steps and expenditures."

Respondent could have provided documentary evidence such as checks, invoices and affidavit(s) in support of the

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[53] Transcript at 106, lines 1 to 4.

[54] Transcript at 104, lines 10 to 25, Transcript at 105, lines 1 to 5.

representations made with respect to capitalized costs incurred during the two and one-half years that it took to make the conversion from acetone to MBE.[55] Respondent mentioned the increased annual operating costs resulting from the conversion[56] but no mention was made of any savings resulting from the conversion; hence, the snapshot of the expenditures is incomplete. Respondent failed to mention that if the emission of VOCs was substantially reduced as a result of the conversion from acetone to MBE, then Respondent's annual fees to the South Coast Air Quality Management District[57] would also be reduced substantially as well. Reducing emissions also provides Respondent with marketable emission credits that are highly profitable in the hands of Respondent. There may be other savings to Respondent that result from the solvent reduction conversion, such as the use of water at the Facility and the use of the stacks which blow the VOC emissions into the air.[58] The testimonial evidence of the expenditures incurred by Respondent is only part of the story. The net expenditures, that is, costs

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[55] Transcript at 105, lines 7 to 14.

[56] Transcript at 110, lines 14 to 23.

[57] Exhbit R-4.

[58] Transcript at 101, lines 3 to 9.

incurred offset by credits and allowances, are all facts that the Trier of Fact is entitled to have in making a determination as to whether credit against the penalty is to be granted to the Respondent.

The reduction in emissions is the goal which makes the claimed expenditures involved in the project environmentally beneficial. Yet, Respondent's only evidence of emission reduction is the testimony of its sole witness at hearing and a statement in the letter, Exhibit R-6. In establishing the claimed achievement in emission reduction in a "clear" and "unequivocal" manner, Respondent should be required to present as a minimum, a record of ambient air monitoring before and after completion of the conversion project.

Complainant urges the Trier of Fact to find that while the reduction of acetone emissions at the Facility is a worthy project, evidence in support of the project falls far short of the quality of evidence stated in the Board's guidance in *Spang*.[59]

Evidence of the project in terms of net expenditure of funds and documentation of the emission reduction achieved is solely

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[59] *Id*.n.52 *supra*, pp.40 and 41.

within the control of Respondent. The Trier of Fact should have more than mere oral statements to rely on as evidence of the project.

On the basis of Respondent's failure to present adequate proof of net expenditures incurred in the conversion project and to show documentation of the effect of the conversion, that is emission reduction at the Facility, the Presiding Administrative Law Judge is urged to deny Respondent any credit as a reduction of the civil penalty to be assessed against Respondent in this action.

2. Termination of the anti-fouling bottom paint service.

According to Mr. Douglas, Respondent painted its last boat bottom in 1994.[60] The paint to which Mr. Douglas referred is applied to the bottom of the boats as a service to Respondent's customers to prevent "growth" on the bottom of the boats.[61] Revenue loss is the environmentally beneficial expenditure for which Respondent seeks credit against the civil penalty to be assessed in the instant action.

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[60] Transcript at 114, line 7.

[61] Transcript at 113, line 22.

No description of the paint's toxic ingredients which were offensive to the environment or toxic to the growth that was being controlled by applying the paint to boat bottoms, was presented at the hearing either orally or in writing. Respondent's witness stated that there was a mark-up on Respondent's cost which generated revenues, but no detail was given as to the identification of the materials used, the VOCs or other toxics emitted by such materials, the costs incurred by Respondent in obtaining such materials, the mark-up and/or the per-boat revenue recovered by Respondent. Mr. Douglas's testimony was limited to a per year estimate of the revenues lost to Respondent as a result of the discontinuance of the bottom paint service.

If Respondent performed the service on a job order basis, that is, each boat was considered a separate job, then Respondent's financial records could be expected to show the number of boats painted during each year the service was available, the costs, including direct labor, materials and overhead per boat, the revenue recovered per boat and the total revenues realized by Respondent for any week, month or year the service was performed. Respondent failed to present such evidence at the hearing.

The evidence presented by Respondent is inadequate proof of the amount of the expenditure to be acknowledged in determining a credit to Respondent against the civil penalty. The evidence presented does not establish in a "clear" and "unequivocal" manner that the termination of the painting service is beneficial to the environment. Further, the *Spang* guidance teaches that there must be a nexus between the project and the violation charged in the Complaint to warrant a penalty reduction.[62] No such nexus was shown by the evidence presented on the record by Respondent.

Complainant urges the Trier of Fact to find that the Respondent failed to present clear and unequivocal evidence of the anti-fouling bottom paint service, and its relationship to Section 313 of EPCRA as required by the *Spang* guidance. Complainant contends that the evidence presented by Respondent regarding the discontinuance of the anti-fouling bottom paint service and its relationship to Respondent's duties under Section 313 of EPCRA is so scant that the Trier of Fact is given no basis that warrants acknowledgement of Respondent's past project through the reduction of the civil penalty under the rubric

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[62] *Id*.n.52 supra,pp.61-62.

VI. CONCLUSION. Based on the foregoing, it is respectfully requested that an Initial Decision issue in favor of Complainant and that a penalty of ONE HUNDRED SIXTY-TWO THOUSAND FIVE HUNDRED DOLLARS be assessed against the Respondent.

Dated: April 14, 1997.

Respectfully submitted,

_____

Counsel for Complainant

Attachement -- 2 letters

CERTIFICATE OF SERVICE

I hereby certify that the original copy of the foregoing Post Hearing Brief was filed with the Regional Hearing Clerk, Region 9 and that a copy was sent by First Class Mail to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, Room 3706 (1900)
Washington, D. C. 20460

and to:

Robert D. Wyatt, Esquire
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Date

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	Docket No. EPCRA-09-94-0015
	)	
CATALINA YACHTS, INC.,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

RESPONDENT'S PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW

I. Background

This proceeding under § 325 of EPCRA was commenced by the filing of a complaint on June 20, 1994, charging Catalina Yachts with failing to file complete and correct Toxic Chemical Release Inventory Reporting Forms ("Form Rs") with the Administrator and the State of California as required by EPCRA Section 313 and 40 CFR Section 372.30. The alleged failures included failing to report acetone for the years 1988 and 1989, and failing to report styrene for the years 1988 through 1992. For these alleged seven violations, EPA Region IX proposed to assess Catalina Yacht the maximum penalty of $175,000 ($25,000 per violation times 7.)

Catalina Yacht answered, admitting that it was the owner or operator of a plant in Woodland Hills, California, and thus of a "facility" as defined by the Act; its facility falls within Standard Industrial Classification, (SIC) Code 3732; and it employs more than ten "full-time employees" as that term was defined in 40 CFR Section 372.3. In short, Catalina Yacht admitted that it was subject to the Act.

Catalina Yacht also admitted that it used acetone as a cleaning agent at its facility during the years 1988 and 1989 and that it processed products containing styrene at its facility during the years 1988 through 1992, inclusive. It asserted, however, that it was unable at the time of its answer to determine whether it

processed or otherwise used acetone and styrene in excess of threshold quantities, and therefore denied any obligation to file "Form Rs." Catalina Yacht requested a hearing to contest the alleged violations and the proposed penalty.

Thereafter, EPA Region IX filed a motion for an accelerated decision as to liability. In response, Catalina Yacht acknowledged that it used resins which contained more than 25,000 pounds of styrene in each year from 1988 through 1992 and that it used more than 10,000 pounds of acetone in 1988 and 1989. Catalina Yacht also acknowledged that it failed to file Form Rs for styrene during the period 1988 through 1992 and for acetone for the years 1988 and 1989. EPA Region IX's motion for an accelerated decision was granted based on these admissions by Order dated January 10, 1995. Catalina Yacht also raised circumstances which it contended should be considered in mitigation of the penalty, and thus the Order specified that the amount of the penalty remained at issue and would be decided after a hearing, if necessary.

On January 28, 1997, a hearing on the amount of civil penalty to be imposed on Catalina Yacht was held. During the hearing EPA Region IX reduced its penalty demand to $162,500 as a result of the delisting of acetone.

II. The Relevant Law

Section 313 of the Emergency Planning and Community Right To Know Act

of 1986, (EPCRA), 42 U.S.C. § 11023(a), requires owners and operators of facilities with 10 or more employees who manufacture, process or otherwise use listed toxic chemicals above certain threshold quantities to file a Toxic Chemical Release Inventory Reporting Form ("Form R") annually with EPA and the state where the facility is located. Styrene is a listed EPRCA toxic chemical. Acetone was a listed EPRCA toxic chemical from 1986 until June 16, 1995, when it was delisted. 60 Fed. Reg. 31643.

Under § 325(c) of EPRCA, 42 U.S.C § 11045(c), "[a]ny person ... who violates any requirement of section 11022 and 11023 ... shall be liable to the United States for a civil penalty in an amount not to exceed $25,000 for each such violation." Although EPRCA itself is silent as to the criteria which should be applied in assessing civil penalties under § 325(c), the criteria set forth in § 325(b) for violations of § 304 "serve as general guidlines for assessing penalties under § 325(c) for violations of § 313." In re Apex Microtechnology, Inc., Doc. No. EPCRA-09-92-00-07 (May 7, 1993), 1993 WL 256426 (E.P.A.) *4.

Under 40 CFR § 22.27(b), the Presiding Officer "shall determine the dollar amount of the recommended civil penalty to be assessed ... in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act." With regard to EPA's

"Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right To Know Act" ("ERP"), it is well established that:

> [W]hile penalty policies facilitate the application of statutory penalty criteria, they serve as guidelines only and there is no mandate that they be rigidly followed.

In Re Pacific Refining Co., EPCRA Appeal No. 94-1, Docket No. EPCRA-09-92-0001, 1994 WL 698476 (E.P.A.) * 4.

Thus, the criteria to be considered in determining the amount of the civil penalty under § 325(b)(1)(C) of EPRCA are as follows:

> In determining the amount of any penalty assessed pursuant to this subsection, the Administrator shall take into account the *nature, circumstances, extent and gravity of the violation or violations* and, with respect to the violator, *ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require.*

The last or "justice" factor ("such other matters as justice may require") in § 325(b)(1)(C) "vests the Agency with broad discretion to reduce the penalty *when the other adjustment factors [under the ERP] prove insufficient or inappropriate to achieve justice.*" In Re Spang & Company, EPCRA Appeal Nos. 94-3 & 94-4, Slip Op. at 27; emphasis original. Under this factor, voluntary projects which benefit the environment undertaken by respondents militate strongly in favor of

reducing potential civil penalties:

> As a matter of policy, the Agency obviously looks favorably upon the undertaking of a project which benefits the environment and which goes beyond the requirements of environmental laws. By considering such behavior in a penalty assessment proceeding the Agency can provide an incentive for companies to engage in environmentally beneficial activities.

In Re Spang & Company, at 28. The Appeals Board also has emphasized that with regard to such projects what is "relevant is a respondent's *past* acts and expenditures.... For example, a project commenced before an enforcement action has begun is more likely to show greater commitment to environmental protection than one commenced after." Id. at 29; emphasis original.

Finally, "it is a maxim of the Agency's corpus juris that 'civil penalties . . . are intended to deter through regulation, not reprimand through punishment. '" In Re Pacific Refining Co., dissenting opinion by Justice McCallum, at *11; citations omitted.

The Presiding Officer, having heard all of the testimony and having reviewed all of the documents entered into evidence, and having read the briefs filed by the parties, now enters the following findings of fact and conclusions of law.

III. Findings of Fact

A. Catalina Yachts manufactures recreational sail boats from eight-foot

dinghies for junior sailing programs to 30-foot cruising boats at 21200 Victory Boulevard, Woodland Hills, California, where it has been located since 1975 and employs approximately 230 employees. (Tr. 78: 23-25; 80:1-4; 80:10-11; 81:3-7.) In 1985, Catalina Yachts opened a second plant in Largo, Florida known as the Morgan Division where it employs 130 employees. (Tr. 80:16-23.)

B. On November 15, 1993, an EPA Region IX inspector named Bill Deviny visited Catalina Yacht's plant in Woodland Hills. (Tr. 90:5.) Mr. Gerald Douglas, Catalina Yachts' chief of engineering and the person responsible for environmental compliance, described what happened:

> Well, Mr. Deviny was a very cordial man. I was paged to our reception area to meet him, and he identified himself as being from EPA. And he asked if he could have a look around, and he showed me his I.D., and I, of course, accommodated him, and we walked through the plant.
>
> And I explained to him the kind of operation we have here and what we are doing. And he asked about the materials we were using. And he asked if we had been reporting any of those to EPA. I explained that we hadn't, we had been reporting them to AQMD [the local Air Quality Management District]. And he advised me at that time of the need to file similar information with the EPA and provided me with the form to do that.

(Tr. 90:9-22.) At the hearing, EPA Region IX confirmed that Catalina Yacht cooperated during the investigation. (Tr. 39:11-14.)

C. Prior to the November 1993 inspection by Mr. Deviny, Catalina Yachts had never been visited by EPA nor had it ever received any correspondence from EPA. (Tr. 81:13-19.) As Mr. Douglas explained, Catalina Yachts historically reported the use of acetone and styrene and their corresponding air emissions annually to the local Air Quality Management District, which visited the Woodland plant almost monthly. (Tr. 81: 20 - 83:14.) Catalina Yachts also reported its use of these two chemicals to the Hazardous Materials Division of the County of Los Angeles Fire Department. (Tr. 82:3-5.) With regard to these agencies or any other agency, Catalina Yachts has never had a reporting violation. (Tr. 83:15-23.)

D. The reason Catalina Yachts did not filed Form Rs for its Woodland Hills plant with EPA from 1988 to 1992 is simply that Mr. Douglas, the person responsible for environmental reporting obligations, did not know about the requirement and held a good faith belief that all air toxic and material storage and use reporting requirements, with which Catalina Yachts regularly complied, were local. (Tr. 119:25 - 120: 7; 87:3:11.) Specifically, at the time of Mr. Deviny's visit in November 1993, Mr. Douglas understood that Catalina Yachts' reporting obligations for its Woodland Hills plant were limited to the AQMD and the Los Angeles Fire Department:

> It was my understanding that the EPA writes certain

> regulations and then charges the state and local agencies with insuring that industries and towns and individuals, I guess, are in compliance with those regulations, and they might write their own regulations to interpret those. And the local agency, in our case AQMD, is responsible for enforcement of those regulations.

(Tr. 86:20 - 87:2.) With regard to its Largo, Florida plant, Mr. Douglas understood that there was an EPA air toxics reporting obligation because he understood that EPA had not delegated that responsibility to the state of Florida. (Tr. 87:12-25.) Catalina Yachts regularly filed Form Rs with EPA for its Largo plant. (Tr. 88:16 - 89:4.)

E. For the past 11 years, Catalina Yachts has conducted a community outreach program in order to provide local citizens with information concerning the nature of its manufacturing operations and the materials used at its Woodland Hills plant. (Tr. 99 - 104.) Specifically, Catalina Yachts held, and continues to hold, open houses for any one who would like to visit the Woodland Hills plant every Thursday at 4:00 p.m. Plant tours are given at that time and questions are answered concerning the materials and processes used in boat building. (Tr. 99 - 101.) The tours are advertized with a sign in the front window of the plant, in the local newspaper, and through the distribution of fliers. (Tr. 102;23 - 103:8.) In 1991, approximately 2,000 people attended a weekend open house held at the Woodland

Hills plant; they were provided with information concerning the materials used in the construction of sail boats. (Tr. 103:9 - 104:9.)

F. On the same day Mr. Deviny visited to Catalina Yachts Woodland Hills plant, Mr. Douglas retained an environmental consultant to assist in the preparation of the seven late Form Rs. (Tr. 90:23 - 91:21.) During the course of gathering the necessary information for the Form Rs, the Woodland Hills plant was severely damaged by the January 17, 1994 Northridge Earthquake and subsequent fire which shut the plant down for four months. (Tr. 91:22 - 93:24.) The epicenter of the earthquake was Northridge, California which is seven miles from the Woodland Hills plant. (Tr. 92:2-3.) Shortly after the Woodland Hills plant reopened, Catalina filed all prior Form Rs with EPA and the Sate of California in May 1994. (Tr. 39:19-21.)

G. For a number of years, Catalina Yachts has voluntarily undertaken significant projects to improve the environment. In addition to the fact that it manufactures sail boats, which are themselves environmentally friendly, Catalina Yachts has voluntarily instituted four specific projects to improve the environment.

First, in 1991, Catalina Yachts, voluntarily initiated a program to find a substitute for acetone which at the time was used extensively to clean tools and boat parts. (Tr. 104:16 - 110:4.) By 1993, Catalina Yachts had converted to DBE for

tool and boat part cleaning thereby eliminating two-thirds of its VOC air emissions at the Woodland Hills plant, or 277,000 gallons of acetone. (Tr. 109:3 - 110:10.) The acetone reduction program cost Catalina Yachts $30,000 in capital expenditures, and $47,000 to $54,000 in additional annual operating expenses. (Tr. 110:14- 111:10.) Thus, over the four years since implementation of the program in 1993, Catalina Yachts has voluntraily spent over $218,000 ($30,000 plus 4 times $47,000) to improve the environment. Catalina Yachts did this even though none of its competitors had. (Tr. 111: 11-15.) In part, because of Catalina Yachts' effort, two boat builders and one tub and shower stall manufacturer subsequently eliminated actone and converted to DBE. (Tr. 112:5-8; Exh. R-6.)

Secondly, in 1994 Catalina Yachts voluntarily eliminated all use of toxic anti-fouling bottom paint at its Woodland Hills plant. As a result of that decision, Catalina yachts has annually lost $28,000 to $30,000 in profit from bottom painting. (Tr. 113:12 - 114:14.) Thus, since 1994, Catalina Yachts has foregone at least $87,000 in profits due to undertakings to improve the environment.

Thirdly, in late 1996, Catalina Yachts voluntarily reduced its air emmissions of styrene by an estimated 15 to 20 percent by using brushable gel coat in the inital phases of construction of boats thereby eliminating a significant amount of spraying of gel coat which requires high use of the solvent styrene. (Tr. 114:15 - 116:25.)

This effort will cost Catalina Yachts $16,000 to $22,000 annually. (Tr. 116:14-25.)

Finally, Catalina Yachts also recently eliminated the use of spirt based contact cement used to glue the furniture components of the boats it manufactures. (Tr. 117:1 - 118:6.) The cost of the materials (water based glues) and labor on this project are essentially a wash. (Id.)

IV. Conclusions of Law

A. EPA Region IX has Failed to Carry its Burden of Proving that the Proposed Penalty of $162,500 is Appropriate

Under 40 CFR § 22.24, EPA Region IX has the burden of proving that the proposed civil penalty is appropriate. As noted above, § 325(b)(1)(C) of EPRCA provides important guidelines for determining the amount of the civil penalty under § 325(c) for violations of § 313. At the hearing, EPA Region IX admitted that in setting the penalty in this case agency staff not only ignored these statutory guidelines but also ignored significant portions of the guidelines set forth in the ERP.

At the hearing, EPA Region IX admitted that it set the original penalty at the maximum of $175,000 based on only three factors: (1) the fact that reporting violations were involved; (2) the volume of chemicals actually used or processed; and (3) the size of the company in terms of employees and gross sales. (Tr. 44:12 -

45:12; Exh. A, Tsai Decl. Exh. 3.) It further admitted that it later reduced the two acetone violations by 25% because acetone was delisted in 1995, thereby reducing the maximum penalty of $175,000 to $162,500.

With regard to the statutory penalty criteria under EPRCA, EPA Region IX simply ignored them in arriving at a proposed penalty. (Tr. 45:13-20.) With regard to the ERP, EPA Region IX admitted that it did not follow that policy in at least two important respects. By unpublished "practice," EPA Region IX did not consider attitude (cooperation and compliance) in determining the penalty in this case, and thus ignored the potential 15% reduction for cooperation and 15% reduction for compliance. (Tr. 37:25 - 38:13; Exh. A, Tsai Decl., para. 9.) EPA Region IX also did not consider "other factors as justice may require" when it determined the penalty here. (Tr. 36:25 - 37:18; Exh. A, Tsai Decl., para. 9.)

EPA Region IX's obvious desire to maximize penalty collections under EPRCA without regard to the statutory and agency created guidelines should not be permitted. If EPA Region IX elects, as it did in this case, not to follow EPA's ERP, then it cannot fairly invoke only those provisions which maximize the potential penalty. It is bad government not only to ignore selected provisions of the ERP but also to ignore or dismiss the statutory guidelines which include such factors as the "nature, circumstances, extent and gravity of the violations, ... any prior history of

such violations, the degree of culpability, economic benefit (if any) resulting from the violation, and such other matters as justice may require." To do so is also fundamentally unjust.

In short, EPA Region IX has failed to carry its burden and prove that the proposed penalty is appropriate. The penalty requested should be denied.

B. Consideration of the Appropriate Factors Compels the Conclusion that Catalina Yachts Should Not Be Subject To Any Civil Penalty

1. Attitude

Under EPA's ERP, the "attitude" (cooperation and compliance) of a respondent is an important factor to be considered in determining the amount of the penalty to be assessed. As the guideline itself states: "Factors such as degree of cooperation and preparedness during inspection, allowing access to records, responsiveness and expeditious provision of supporting documentation requested by EPA during and after the inspection" are important considerations (a downward adjustment of up to 15%) in determining the amount of the penalty. (Exh. R-2, at 18.) The ERP also states that the penalty may be adjusted downward another 15% "in consideration of the facility's good faith efforts to comply with EPRCA, and the speed and completeness with which it comes into compliance." (Id.)

The undisputed facts fully support a 15% reduction of the penalty of

$175,000 for cooperation and a 15% reduction for compliance. Thus, with an adjustment for the attitude factor the maximal penalty proposed by EPA is properly reduced by $52,500 (30% of $175,000).

2. The Nature, Circumstances, Extent and Gravity of the Violation

Catalina Yachts annually provided local regulatory agencies with information concerning the use and release of acetone and styrene at the Woodland Hills plant, albeit not in a Form R. Catalina Yachts also has made extraordinary efforts over the years through its open house program to inform the local community concerning the materials used at its Woodland Hills plant. Catalina Yachts did not attempt to evade or ignore EPRCA's reporting requirements at any time. Rather, it was simply unaware of the requirement and, because it had never heard from EPA before November 1993, it had a good faith belief that its air toxic reporting requirements were fully satified by regional and local written report's.

If the statutory guidelines (the nature, circumstances, extent and gravity of the violation) are to have meaning when applied to such facts, a further significant reduction of the proposed penalty is compelled. Certainly, such considerations are at least as important as the attitude factor. Thus, the proposed penalty should be reduced by an additional 30% or $ 52,500.

3. Prior History of Violations

Catalina Yachts has not at any other time violated EPRCA, or any other environmental reporting obligation. Again, if this statutory factor is to have meaning, an additional reduction in the penalty is warranted. A 15% or $26,500 reduction would seem appropriate.

4. Degree of Culpability

In many ways, the degree of culpability factor is subsumed in the "nature, circumstances, extent and gravity of the violation" factors. Thus, no additional adjustment is proposed other than noting that given Catalina Yachts' good faith belief that it was complying with all applicable reporting laws its conduct was not blameworthy. Such a conclusion only reinforces the application of a 30% reduction under the "nature and circumstance" factor.

5. Economic Benefit Resulting From the Violation

Catalina Yachts did not derive any economic benefit from its failure to prepare the necessary Form Rs. As Mr. Douglas explained at the hearing, during the time such reports were due, Catalina Yachts had already retained a consultant to assist it in preparing other air toxic and material use reports. It would have cost Catalina Yachts at most a few hundred dollars more to have that consultant prepare the Form R reports. (Tr. 98:24 - 99:24.) Accordingly, while we do not suggest

here an additional downward adjustment, the facts under this factor reinforce the above proposed reductions.

6. Such Other Matters as Justice Requires

As noted above, the voluntary efforts of a respondent to improve the environment as a matter of good corporate citizenship is an important factor to be considered in assessing a civil penalty under EPRCA. Since 1991, Catalina Yachts has incurred $305,000 in costs and lost profits and will continue to incur annually an additional $91,000 to $106,000 as a direct result of its voluntary efforts to improve its operations for the benefit of the environment and those who live and work at or near the Woodland Hills plant. Such voluntary expenditures are to be encouraged and this should eliminate any further balance on the proposed penalty.

7. Conclusion

Application of the statutory guidelines for EPRCA's reporting violations to the facts of this case compel the conclusion that no penalty should be assessed in this case. The numbers are summarized as follows:

Maximum Penalty	$175,000
Acetone Delisiting (15% of $50,000)	($12,500)
Attitude (30%)	($52,500)
Nature and Circumstances (30%)	($52,500)

Past Violations History (15%) ($26,250)

Past Voluntary Environmental Works ($308,000)

Ongoing Annual Environmental Works ($91,000 to $106,000)

The penalty in this case is not about punishment. Rather, as Justice McCallum has said, it is about assuring that the laws and regulations of the government are followed. Here, to penalize Catalina Yachts would not further compliance with the law. It would be unjust and would only promote the notion that our government is neither caring nor thoughtful.

Dated: _____

_____
Presiding Officer

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CERTIFICATE OF SERVICE

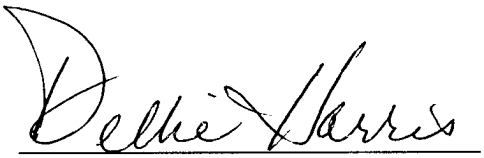
I hereby certify that the original copy of the foregoing Respondent's Opening Brief and Respondent's Proposed Findings of Fact and Conclusion of Law were sent by Federal Express to the Regional Hearing Clerk, United States Environmental Protection Agency, Region 9, and that a copy was sent by Federal Express to:

Spencer T. Nissen
Administrative Law Judge
Office of Administrative Law Judges
United States Environmental Protection Agency
401 M Street, S.W., Room 3706 (A-110)
Washngton, D.C. 20460

and by First Class Mail to:

David M. Jones, Esq.
Office of Regional Counsel, RC-2-1
United States EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Date: April 11, 1997



Debbie Harris